

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

DECISION AND ORDER

vs.

17-CR-6016/17-CR-6017¹

RICHARD LEON WILBERN,

Defendant.

Assistant Federal Public Defenders Anne Burger and Sonya Zoglin, of the Federal Public Defenders Office of the Western District of New York, having been assigned to represent the above-named defendant, brought to the Court's attention, *ex parte*, a potential conflict of interest resulting from their office's concurrent representation of their client, Richard Leon Wilbern and another individual named Thomas Terrell Lofton. Ms. Burger and Ms. Zoglin are assigned to the Rochester Division of the Federal Public Defender's Office for the Western District of New York. Mr. Lofton was being represented by members of the Buffalo Division on a motion currently pending before the Second Circuit Court of Appeals seeking permission to file a second or successive habeas motion pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015). The motion is presently stayed pending a decision in *United States v. Barrett*, 14-2641. Ms. Burger and Ms. Zoglin only learned of the potential conflict through discovery provided by the Government in connection with the above captioned cases. Ms. Burger and Ms. Zoglin

¹ All docket references are to 17-CR-6017.

brought the potential conflict to the Court's attention *ex parte* in order to maintain client confidences relating to their representation of Mr. Wilbern.

Upon being informed of the potential conflict, the Court identified New York Rule of Professional Responsibility 1.7 as applicable to the situation. It should be noted that attorneys who practice in the Western District of New York must comply with the New York Rules of Professional Responsibility. The Court then undertook a careful and extensive review of the matter, which included *in camera*, *ex parte* proceedings and the submission of memoranda and materials under seal.² The Court's review consisted of the following:

<u>Docket No.</u>	<u>Document</u>
45	Minute entry of <i>ex parte</i> proceeding held on May 7, 2018 – transcript to be sealed.
46	Minute entry of <i>ex parte</i> proceeding held on May 21, 2018 – transcript to be sealed.
49	Minute entry of <i>ex parte</i> proceeding held on May 30, 2018 – transcript to be sealed.
50	Minute entry of <i>ex parte</i> proceeding held on May 30, 2018 – transcript to be sealed.
52	April 25, 2018 correspondence from Ms. Burger – filed under seal;
53	May 17, 2018 correspondence from Ms. Burger with attached memorandum – filed under seal;

² For each *ex parte* proceeding, the Court has directed the court reporter present to prepare the transcript and file it under seal in the event it would be needed for any type of appellate review.

54 May 29, 2018 memo from Ms. Zoghlil – filed under seal;

55 June 4, 2018 memo from Ms. Zoghlil – filed under seal;

57 Minute entry of *ex parte* proceeding held on June 5, 2018 – transcript filed under seal (ECF No. 60);

58 Waiver of Conflict of Interest (unredacted) of Richard Leon Wilbern – filed under seal;

59 Waiver of Conflict of Interest as to Thomas Terrell Lofton;

61 Minute entry of *ex parte* conference held on June 11, 2018, appointing David Rothenberg, Esq., as conflict free counsel to represent Thomas Terrell Lofton - filed under seal;

62 Minute entry of *ex parte* conference held on June 12, 2018, appointing Scott Green, Esq., as conflict free counsel to represent defendant - filed under seal;

65 June 21, 2018 correspondence to the Court from Ms. Zoghlil;

66 Waiver of Conflict of Interest (redacted) as to Richard Leon Wilbern;

68 June 27, 2018 correspondence to the Court from
Marianne Marianno with order from Second Circuit
attached;

69 Professor Roy D. Simon's opinion letter (redacted);

70 Professor Roy D. Simon's opinion letter - filed under
seal;

71 New York State Bar informal opinion - filed under seal.

As indicated above that the submissions to the Court included an informal opinion from the New York State Bar Association (ECF No. 71) and a letter opinion (ECF No. 70) from Professor Roy D. Simon, author of Simon's New York Rules of Professional Conduct Annotated, both indicating that the conflict was waivable and the circumstances under which Ms. Burger and Ms. Zoghlin could continue to represent Mr. Wilbern.

At a June 22, 2018, appearance in open court, the Court, in great detail, reviewed what had occurred to date, as well as its conclusions with respect to the potential conflict. The transcript of the June 22, 2018 appearance is attached and made part of this Decision and Order.

Based upon the above, the Court makes the following findings:

1. Pursuant to the New York Rule of Professional Responsibility 1.7, the conflict situation at issue is waivable;
2. Richard Leon Wilbern, being represented by conflict free counsel, knowingly, intelligently and voluntarily waived the potential conflict orally and in writing;
3. Thomas Terrell Lofton, being represented by conflict free counsel, knowingly, intelligently and voluntarily waived the potential conflict orally and in writing;

4. The Federal Public Defender's Office no longer represents Thomas Terrell Lofton having been granted permission to withdraw as his counsel by the Second Circuit Court of Appeals. (ECF No. 68);
5. Anne Burger and Sonya Zoglin, counsel for Mr. Wilbern, have no knowledge of any client confidences relating to their office's representation of Thomas Terrell Lofton;
6. The Federal Public Defender Marianne Mariano promptly took steps to erect an ethical wall, which includes an electronic component, guaranteeing that Ms. Burger and Ms. Zoglin cannot access any information relating to their offices now prior representation of Thomas Terrell Lofton. In fact, only Ms. Mariano and her systems administrator can access such information.

Accordingly, the Court concludes that Ms. Burger and Ms. Zoglin may now properly continue to represent Richard Leon Wilbern in the above captioned cases.

DATED: July 2, 2018
Rochester, New York

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge